

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0310

Reversed & Remanded

PROCEDURAL HISTORY: On January 7, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause and was disqualified from receiving unemployment insurance benefits effective April 26, 2020 (decision # 140350). Claimant filed a timely request for hearing. On April 1, 2021, ALJ Snyder conducted a hearing, and on April 9, 2021 issued Order No. 21-UI-164511, modifying decision # 140350 by concluding that claimant quit without good cause and was disqualified from receiving benefits effective May 3, 2020. On April 20, 2021, claimant filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented him from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. EAB considered claimant's argument to the extent it was based on the record.

The parties may offer new information, such as information contained in claimant's written argument, into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

FINDINGS OF FACT: (1) Walmart Associates Inc. employed claimant from November 2017 until May 4, 2020.

(2) Claimant suffered from asthma and his wife had an autoimmune disease, which were medical conditions that made them more likely to get severely ill from COVID-19.

(3) In early 2020, claimant broke his foot and soon thereafter took a leave of absence with a return to work date scheduled for April 5, 2020. On April 5, 2020, claimant returned to work. Upon arriving at the employer's store, claimant became concerned about the risk of exposure to COVID-19. "As far as [claimant] could tell . . . public guidance wasn't being followed." Audio Record at 12:37. It appeared to claimant that people in the employer's store were not social distancing or wearing face coverings. Claimant also did not think the employer was checking the temperature of workers as they arrived for their shifts.

(4) Due to his concerns about COVID-19 exposure and he and his wife's medical conditions, claimant arranged with the employer to take an optional COVID-19 related leave of absence, with a return to work date of May 4, 2020.

(5) On May 4, 2020, claimant did not return to work because he heard from other employees that the employer's enforcement of COVID-19 safety measures had not changed since he was last there on April 5, 2020. Claimant did not visit the employer's store to confirm what he heard from the other employees.

(6) On May 4, 2020, claimant voluntarily quit because of his concern about the risk of exposure to COVID-19 at the employer's store. However, he did not inform the employer of his decision to quit. Some weeks after May 4, 2020, the employer contacted claimant to verify his work status. Claimant confirmed that he had quit on May 4, 2020.

(7) Claimant did not ask the employer if he would be permitted to extend his leave of absence period prior to quitting work on May 4, 2020.

CONCLUSIONS AND REASONS: Order No. 21-UI-164511 is reversed and the matter remanded for further development of the record.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless they prove, by a preponderance of the evidence, that they had good cause for leaving work when they did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause . . . is such that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would leave work." OAR 471-030-0038(4) (September 22, 2020). "[T]he reason must be of such gravity that the individual has no reasonable alternative but to leave work." OAR 471-030-0038(4). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). Claimant had asthma, a permanent or long-term "physical or mental impairment" as defined at 29 CFR §1630.2(h). A claimant with an impairment who quits work must show that no reasonable and prudent person with the characteristics and qualities of an individual with such an impairment would have continued to work for their employer for an additional period of time.

Oregon temporary rules set out unemployment insurance provisions applicable to the unique situations arising due to COVID-19 and the actions to slow its spread. OAR 471-030-0070(2)(b) (effective March 8, 2020 through September 12, 2020) provides that an individual who quits work because of a COVID-19 related situation is not disqualified from receiving unemployment insurance benefits. Under OAR 471-030-0070(1), a COVID-19 related situation includes the following:

* * *

(c) A person is unable to work because they have been advised by their health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus[.]

* * *

The order under review concluded that claimant quit work without good cause. The order reasoned that claimant's situation was grave but that claimant did not pursue reasonable alternatives prior to leaving work. Order No. 21-UI-164511 at 3. However, the record as developed is insufficient to determine if claimant quit work with good cause.

First, the record requires more development to determine whether claimant faced a grave situation when he quit on May 4, 2020. The record shows that claimant chose to quit on May 4, 2020 based on secondhand information that the COVID-19 safety protocols in place at the employer's store at that time had not changed since claimant had last worked on April 5, 2020. Further inquiry is required to determine whether a reasonable and prudent person with the characteristics of claimant's asthma would have quit on May 4, 2020 based on the conditions claimant observed when he last worked on April 5, 2020, which were allegedly the same conditions in place when claimant left work on May 4, 2020. To that end, the ALJ should ask questions to gain more detail on what, if any, COVID-19 safety protocols were in effect and being enforced on April 5, 2020, and what claimant observed at the employer's store on that date regarding safety protocols and whether the employer was enforcing them. The record should also be developed as to what, if any, COVID-19 safety protocols were in effect and being enforced on the date claimant quit, May 4, 2020. The ALJ also should ask questions to assess the reliability of the secondhand information claimant received from other employees that led him to believe that the conditions at the employer's store on May 4, 2020 had not changed from what he observed on April 5, 2020.

Second, the order under review based its conclusion that claimant quit work without good cause on the premise that claimant failed to pursue reasonable alternatives prior to quitting because, before he quit, claimant did not request additional leave beyond his May 4, 2020 return to work date. Order No. 21-UI-164511 at 3. The record as developed is insufficient to determine whether seeking a leave of absence was a reasonable alternative for claimant when he quit. The record does not show if the employer would have allowed claimant to extend his leave of absence had he asked to do so. At hearing, claimant testified that he believed he was not eligible to extend his leave unless he provided the employer with a doctor's note, and he did not obtain a doctor's note because he could not afford to see a doctor. Audio Record at 16:20. The employer's witness testified that claimant would have needed to request an extended leave through a third party administrator that the employer retained. Audio Record at 23:01. However, the employer's witness was not asked what, if anything, claimant was required to submit to be granted an extended leave. On remand, the record should be developed to show what exactly claimant was required to do or submit to obtain an extended leave and how long claimant would have been able to take an extended leave if one were granted. The record should also be developed to show whether obtaining an extended leave of absence would have been futile in any event because the circumstances that led to claimant's quit would have persisted following the end of any extended leave period.

Finally, the record should be developed on remand to assess whether claimant quit work due to a COVID-19 related situation as provided by OAR 471-030-0070(1)(c). That is, the ALJ should ask questions on remand to determine whether claimant quit because he was unable to work because he had been “advised by [his] health care provider or by advice issued by public health officials to self-quarantine due to possible risk of exposure to, or spread of, the novel coronavirus.” To this end, the ALJ should ask if claimant was advised by a health care provider or public health official to self-quarantine, and if so, when this advice was issued and what, specifically, any such advice entailed. Should the evidence on remand appear to implicate any other COVID-19 related situation set forth by OAR 471-030-0070(1), the record should be appropriately developed to determine whether those COVID-19 situations were applicable in claimant’s circumstances as well.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because further development of the record is necessary for a determination of whether claimant quit work without good cause, Order No. 21-UI-164511 is reversed, and this matter is remanded.

DECISION: Order No. 21-UI-164511 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. Hettle;
A. Steger-Bentz, not participating.

DATE of Service: May 27, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 21-UI-164511 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyong ito.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄໍາຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄໍາຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນໍາຄໍາຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄໍາຮ້ອງຂໍການທົບທວນຄໍາຕັດສິນນໍາສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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